



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 29, 1994

Ms. Sammie Glasco  
Assistant General Counsel  
Texas Department of Banking  
2601 N. Lamar Boulevard  
Austin, Texas 78705-4294

OR94-205

Dear Ms. Glasco:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 22047.

The Texas Department of Banking (the "department") received a request for the following:

1. The annual report of Pioneer filed under Section 7 of Article 548b for the three most recent years.
2. Records of Examinations made of Pioneer under Section 8 of Article 548b for the three most recent years.
3. Documents pertaining to the acquisition of Pioneer by N.S. Griggs Pioneer Funeral Plans, Inc., including documents between Pioneer and N.S. Griggs and copies of proceedings had before the Department of Banking in connection with securing the approval of such acquisition.

You state that "[t]he Department has released all information except copies of the reports of examination dated March 31, 1990, December 31, 1991, and February 28, 1993." You

<sup>1</sup>We note that V.T.C.S. article 6252-17a was repealed by the 73d Legislature. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

claim that this information is excepted from required public disclosure under sections 552.101, 552.110 and 552.112 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Article 548b, section 8(c), V.T.C.S., provides that

[a]ll information obtained, either directly or indirectly, by the Department *relative to the financial condition of any seller* whether obtained through examination or otherwise, except published statements, and all files and records of the Department relative thereto shall be confidential . . . .

Acts 1993, 73d Leg., ch. 808, § 1, at 3229 (emphasis added). A "seller" is defined as "a person selling, accepting funds or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or policies of insurance to fund prepaid funeral benefits in this state." *Id.* at 3215 (adding article 548b, section 1(b)(10)). In turn, the term "prepaid funeral benefits" is defined as

prearranged or prepaid funeral or cemetery services or funeral merchandise, including caskets, grave vaults, and *all other articles of merchandise incidental to a funeral service. The term does not include a grave lot, grave space, grave marker, monument, tombstone, crypt, niche, or mausoleum . . . .*

*Id.* (adding article 548b, § 1(b)(9)) (emphasis added).

We have examined the documents submitted for our review and have marked the portions that constitute information "relative to the financial condition of" the prepaid funeral permit holder at issue. This information is made confidential by article 548b, section 8(c), V.T.C.S. The remainder of the information, however, relates more generally to the company's business practices and does not reveal specific financial information or general information about its overall financial stability. We do not believe that such information is made confidential by article 548b, section 8(c), V.T.C.S.

Section 552.112 excepts:

(a) . . . information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

(b) In this section, "securities" has the meaning assigned by The Securities Act.

This section applies to examinations of *financial institutions*. It "focuses on specific information generated during the regulation or supervision of financial institutions." Open Records Decision No. 483 (1987) at 9; Open Records Decision No. 158 (1977) at 4-8. The term "financial institutions" is not defined in this section. In Open Records Decision No. 158, however, this office adopted the definition of the term "financial institution" in the Business Corporation Act of Texas, which is as follows:

"Financial institution" means any banking corporation or trust company, building and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or other institution *engaged primarily in lending or investing funds*.

V.T.C.S. art. 1528(g) (emphasis added); Open Records Decision No. 158 at 5.

You state that "[s]ome prepaid funeral permit holders hold and invest prepaid funeral trust funds" and that "[o]ther permit holders are insurance companies who sell insurance policies to fund prepaid funeral contracts." It is not apparent nor do you indicate that the prepaid funeral permit holder at issue is a trust company, an insurance company or an institution engaged primarily in lending or investing funds. Accordingly, you may not withhold the remaining information under section 552.112 of the Government Code.

Section 552.110 excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person. Because section 552.110 requires that excepted information be made confidential by statute or judicial decision, it is redundant with section 552.101. However, because it concerns a specialized category of information, *i.e.*, trade secrets, it is useful to consider section 552.110 separately.

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or

other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.* The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. *See* Open Records Decision No. 552 (1990) at 5.

Pursuant to section 552.305(b) of the Government Code, this office notified Pioneer Security Plans, Inc., of the third party request for information from the department and offered the entity an opportunity to address the availability of the records relating to it. Pioneer Security Plans, Inc., has made no reply to this office. Because neither Pioneer Security Plans, Inc., nor the department raise any arguments under the trade secret exception of section 552.110, you may not withhold the remaining information concerning this entity under that provision of the Open Records Act.

As already noted, the commercial or financial information aspect of section 552.110 is redundant of section 552.101. To the extent that statutes confer confidentiality on commercial or financial information, such confidentiality will be incorporated into the Open Records Act by either section. The common law of Texas at present recognizes no doctrine, other than that of trade secret, that has ever been asserted as a basis for invoking the protection of section 552.110. At one time, this office employed tests developed by federal courts applying the federal Freedom of Information Act as a basis for excepting information as "commercial or financial information" under section 552.110. The principal federal test, the so-called *National Parks* test, excepted financial information from disclosure if such disclosure was likely either (1) to impair the government's ability to obtain the information in the future or (2) to cause substantial harm to the competitive position of the person from whom it was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). However, in Open Records Decision No. 592 (1991) at 6, this office overruled the line of decisions that had applied the *National Parks* test on the grounds that *National Parks* was not "an expression of the common law of privilege or confidentiality."

Open Records Decision No. 592 makes plain that "commercial and financial information" must be confidential "under the common or statutory law of Texas" to be exempt from disclosure under the Open Records Act. The fact that such disclosure may cause harm to the competitive position of the person who supplied the information or that the person may have provided the information to the governmental body under a promise of secrecy is not sufficient to keep the information private.

As we have discussed above, *see* discussion of section 552.101 *supra*, only portions of the requested information are made confidential by statute. Accordingly, you may not withhold the remaining information concerning Pioneer Security Plans, Inc., under section 552.110 of the Government Code as "commercial or financial information."

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/LBC/rho

Ref.: ID# 22047

Enclosures: Marked documents

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(w/o enclosures)